

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-214983**DATE:** January 14, 1985**MATTER OF:** Manuel Cravalho**DIGEST:**

An individual serving under a void enlistment who is subsequently retired for disability never attained the military status necessary to be entitled to active duty pay and allowances or retired pay.

However, under a theory analogous to the de facto rule, the pay and allowances and retired pay he actually received may be retained. Under that rule he is not entitled to a refund for deductions made for Survivor Benefit Plan coverage even if it was determined that he had an eligible beneficiary. The Secretary may waive the fraud in the enlistment which would give the individual military status and entitlement to the pay and retired pay he received. If the fraud is waived, a determination must be made whether the individual he designated under the Survivor Benefit Plan is his spouse. If she is not, the deduction must be refunded since she would not be an eligible beneficiary.

An individual who, subsequent to being discharged under conditions other than honorable, reenlisted using his brother's name and social security number. During that enlistment the member was retired for disability. We are asked whether, if the fraud is waived and the reenlistment validated, it would be appropriate to include the member's service under the first enlistment in his own name and recompute his retired pay entitlement. We are asked in the alternative whether, if the fraud is not waived, there is a basis for disability retirement.^{1/}

^{1/} The questions were presented by J. E. Boone, a Special Disbursing Agent, Retired Pay Operations, Army Finance and Accounting Center, and have been assigned submission number DO-A-1436 by the Department of Defense Military Pay and Allowance Committee.

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The reenlistment was void and, in the absence of Secretarial action waiving the fraud, the member involved never attained a military status and thus could not be retired. He may, however, retain any pay, including retired pay, and allowances which he received. If the fraud is waived, he is entitled to retired pay recomputed to include the earlier service from the date of his retirement. Also, if a determination is made that the woman designated as his spouse under the Survivor Benefit Plan is his brother's wife, the amounts deducted from his retired pay under the Plan should be refunded to him.

Mr. Manuel Cravalho, RA 10-125-624, SSN 576-46-5961, served in the Army from December 30, 1966, through June 4, 1969, when he was discharged under conditions other than honorable. He was credited with 2 years, 3 months and 8 days of service for this period.

He later enlisted using his brother's name and social security number, Charles C. Cravalho, 576-60-1547. He is credited, as Charles, with 2 years, 11 months and 29 days of active service. He was placed on the Temporary Disability Retired List effective February 19, 1977, with a disability rating of 30 percent and began receiving retired pay. He was later placed on the Permanent Disability Retired List on April 1, 1981, with a 30 percent disability rating.

Mr. Cravalho elected Survivor Benefit Plan coverage for Leonette Cravalho designating her as his spouse. His date of marriage is shown as November 19, 1977. Deduction from his retired pay for the coverage began December 1, 1978. Since Manuel Cravalho has been using his brother's name, it is unclear from the record whether Leonette is actually married to Manuel and is in fact his spouse, or if she is married to Charles C. Cravalho, and is Manuel's sister-in-law.

In the case before us, the fraud was not discovered during the enlistment but only after the individual had been retired for disability. The Secretary has not taken action to waive the fraud or void the enlistment.

At the outset, it should be noted that when an individual enlists in a uniformed service, it effects a change in his status. His right to pay and allowances is dependent on

his status as a member of the service and is derived from statute. His entitlement to pay and allowances is not contingent on the duties he performs, but rather on the status he occupies. See Bell v. United States, 366 U.S. 393 (1961), and cases cited therein, and 55 Comp. Gen. 1421 (1976). Thus, in determining whether an individual is entitled to pay and allowances as a member, it is necessary to determine whether he has achieved military status. 54 Comp. Gen. 291 at 294 (1974).

In certain cases involving fraudulent enlistments the Government, on discovering the fraud, has the option of waiving the fraud and thereby validating the enlistment or avoiding the enlistment contract by discharging the individual. The fact that an event occurs which precludes avoidance of the enlistment contract prior to discharge does not validate the void enlistment. See, for example, Jerry B. James, B-186902, September 8, 1976. A member who enters the Armed Forces fraudulently and is discharged on the discovery of the fraud does not acquire the necessary military status and is not entitled to pay and allowances unless specifically authorized by statute, since the discharge constitutes an avoidance of the contract from its inception. See 54 Comp. Gen. 291 (1974); 47 Comp. Gen. 671 (1968).

We have held, however, that although an enlistment is voided, the individual may retain pay and allowances received for his services if such payments were otherwise proper. This rule is based on a theory analogous to the de facto officer rule. See 31 Comp. Gen. 562 (1952) and B-179517, May 15, 1974. This does not change the fact that if the enlistment is voided, the individual has no status as a member of the Armed Forces. See 30 Comp. Gen. 528 (1951). Further, this theory is applicable to retired pay. Compare 44 Comp. Gen. 258 (1964).

In the instant case, the fraudulent enlistment was not discovered until Mr. Cravalho had been released from active duty and retired for disability. Additionally, as well as enlisting under a different name, Mr. Cravalho enlisted contrary to a specific statute prohibiting reenlistments of persons whose last term of service was not honest and faithful unless reenlistment is specifically approved by the Secretary concerned. See 10 U.S.C. 508(a).

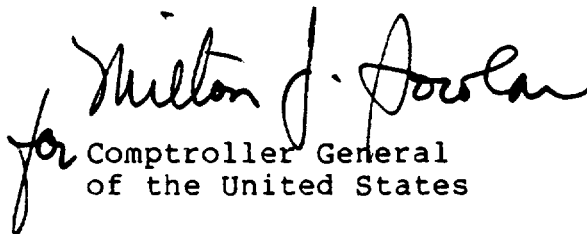
Retirement for disability is authorized for military members under the provisions of chapter 61, title 10, United

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States Code. These provisions require that, in order to be retired for disability, a member must be "entitled to basic pay." Therefore, an individual who, due to fraudulent enlistment, did not attain a military status is not entitled to basic pay and would not be eligible for retirement for disability. Thus, Mr. Cravalho's enlistment was void and the disability retirement stemming from that enlistment is also void. However, as noted above, the Government has the option in such cases of accepting the service by waiving the fraud. This would validate the enlistment and the disability retirement.

If Secretarial waiver is granted, Mr. Cravalho should be credited with the service he performed under his own name. He would then be entitled to all the pay and allowances under the enlistment and to the retired pay from the date of his retirement recomputed on the basis of his earlier service. If the fraud is waived, it also will be necessary to determine whether Leonette Cravalho is the spouse of Manuel or Charles C. Cravalho. If she is the spouse of Charles Cravalho, the amounts deducted from Mr. Manuel Cravalho's retired pay under the Survivor Benefit Plan may be refunded to him since he was not eligible to participate in the Plan for spouse coverage. If she is the spouse of Manuel Cravalho, the amounts deducted were properly deducted in accordance with his election to provide benefits to his eligible spouse.

If Secretarial waiver is not granted the enlistment was void and Mr. Cravalho never attained a military status from which he could be retired. He may still retain any pay and allowances he received under a rule analogous to the de facto officer rule, which we find is equally applicable to the retired pay he received. However, he is not entitled to any additional payment since, under the de facto rule, payments received may be retained but no further payments may be made.


for Comptroller General
of the United States